ARTHUR M. EIDELHOCH, Bar No. 168096
aeidelhoch@littler.com
GALEN M. LICHTENSTEIN, Bar No. 251274
glichtenstein@littler.com
LITTLER MENDELSON, P.C.
650 California Street, 20th Floor
San Francisco, California 94108.2693
Telephone: 415.433.1940
Facsimile: 415.399.8490

JACQUELINE E. KALK (admitted *pro hac vice*)
jkalk@littler.com
LITTLER MENDELSON, P.C.
80 South 8th Street, Suite 1300
Minneapolis, MN 55402.2136
Telephone: 612-313-7645
Facsimile: 612.677.3139

KELLY D. REESE (admitted *pro hac vice)*
kreese@littler.com
R. BRADLEY ADAMS (admitted *pro hac vice)*
radams@littler.com
LITTLER MENDELSON, P.C.
63 South Royal Street, Suite 901
Mobile, AL 36602.3218
Telephone: 251-432-2477
Facsimile: 251-432-0427

Attorneys for Defendants
CROWDFLOWER, INC., LUKAS BIEWALD
AND CHRIS VAN PELT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTOPHER OTEY, on behalf of himself and all others similarly situated,

Plaintiff,

v.

CROWDFLOWER, INC., LUKAS BIEWALD and CHRIS VAN PELT,

Defendant.

Case No. 3:12-cv-05524-JST

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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650 California Street
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San Francisco, CA 94108.2693
415.433.1940

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650 California Street
20th Floor
San Francisco, CA 94108.2693
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I. INTRODUCTION

Notwithstanding Plaintiffs arguments to the contrary, Defendants' offer of judgment to Plaintiff Christopher Otey ("Otey"), which includes liquidated damages under the FLSA, did not need to also include an amount for "wage penalties" under Oregon law because recovery of penalties under both the federal and state law would be duplicative. Further, even if Defendants' offer to Otey did not moot his claim for wage penalties, it mooted all of his other claims under state and federal law as well as his collective claim under the FLSA. Consequently, and for the reasons explained below and in Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure [Dkt. 150] ("Motion"), the Court lacks subject matter jurisdiction over those claims as well as Plaintiff Mary Greth's ("Greth") claims under the FLSA. Further, the amount in controversy does not meet the $5,000,000 threshold required under 28 U.S.C. § 1332(d)(2), depriving this Court of jurisdiction over any remaining claims under Oregon law. Additionally, to the extent that any state law claims remain, the Court should decline to exercise supplemental jurisdiction over them.

II. ARGUMENT

A. The Offer of Judgment for Plaintiff Otey Did Not Need to Include An Amount for "Wage Penalties" Under Oregon Law In Addition To An Amount for Liquidated Damages Under the FLSA.

Plaintiff's Response, in large part, is premised on Plaintiffs' argument that Defendants' offer of judgment to Otey did not fully satisfy all of his claims because it did not include an allocation for "wage penalties" under Oregon law, ORS § 652.150. (*See* Dkt. pp. 3; 7-8.) Otey is not, however, entitled to penalty wages under Oregon *in addition to* liquidated damages under the FLSA, which clearly were included in Defendants' offer of judgment to Otey. In *Travis v. Knappenberger*, the plaintiffs asserted claims under both federal and Oregon law for alleged unpaid overtime. *See Travis v. Knappenberger*, Dkt. 186, 3:00-cv-00393 (D. Or. Sept. 25, 2002).[1] The plaintiffs later accepted an offer of judgment for overtime wages and liquidated damages, calculated pursuant to the FLSA. *See id.* The plaintiffs later sought an additional approximately $12,000 in penalties under Oregon law based on the defendant's late payment of overtime. *See id.* In concluding that the plaintiffs could not recover the wage penalties under Oregon law, the district court reasoned as follows:

[1] Copies of this unpublished Order from this case are attached as Exhibit A.

> Courts have consistently held that the remedies provided under 216(b) of the FLSA, which includes liquidated damages, are the exclusive remedies for enforcing rights created under the FLSA. *See*, *e.g.*, *Roman v. Maietta Construction, Inc.*, 147 F. 3d 71, 76 (1st Cir. 1998); *Tombrello v. USX Corp.*, 763 F. Supp. 541, 544 (N.D. Ala. 1991). As a matter of law, plaintiffs cannot circumvent the exclusive remedies prescribed by Congress by asserting, as to the overtime violation, a right to receive penalties under state law claim in addition to the penalties they have already received under the FLSA. *Roman*, 147 F. 3d at 76; *Tombrello*, 763 F. Supp. at 545. Therefore, I conclude that because plaintiffs sought and recovered liquidated damages under the FLSA for the overtime pay violations, they cannot recover again under Oregon law. Plaintiffs are not entitled to a double recovery. *Bolduc v. National Semiconductor Corp*., 35 F. Supp. 2d 106, 117 (D. Maine).

See id., *aff'd*, 87 Fed. Appx. 24, *26 (9th Cir. Dec. 17, 2003) ("The district court properly declined to award penalty wages to plaintiffs under O.R.S. § 653.055. Because plaintiffs accepted [the defendant's] offer of judgment pursuant to Federal Labor Standards Act § 216, recovery under O.R.S. § 653.055 would have been cumulative."). Further, in *Divine v. Levy*, another district court directly addressed this precise issue, concluding that the "savings clause" of the FLSA, 29 U.S.C.A. § 218:

> refers only to minimum wage, maximum workweek, and child-labor; it is silent as to penalty provisions. Therefore, we should assume that the act of Congress, through this section, by implication, supersedes the penalty provisions of the various state statutes on the relation of employer and employee. Under § 216(b), we find that penalties under civil liability fixed by the Act to be 'the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, *and in an additional equal amount as liquidated damages*. . . .
>
> The plaintiff has entered the court under the Federal act, seeking for himself all of its advantages. Should he be benefited additionally with whatever penalties the Louisiana state may accord him? We answer in the negative.
>
> Even though the penalties of both the state and federal statutes could be imposed without there being a direct conflict, we believe the penalty provision of the Federal act, when invoked, becomes exclusive and the penalty provisions of the state statute may not be applied. There may be no exact conflict in actual application of the two penalties, but, nevertheless, they conflict in essence because of duplicity. The Congress measured the penalty by the exactions of the Act (minimum wage, maximum hours, etc.) and no other than the specific penalties are to be imposed.

Divine v. Levy, 36 F. Supp. 55, 57-58 (W.D. La. 1940). Otey likewise cannot then recover wage payment penalties under Oregon law in addition to liquidated damages under the FLSA. *See id*.; *Colson v. Avnet, Inc*., 687 F. Supp. 2d 914, 923-24 (D. Ariz. 2010) (dismissing Oregon state law claim under O.R.S. § 653.055 as preempted by the FLSA, reasoning that the plaintiff "essentially

seeks to piggy-back thirty days' wages worth of waiting-time penalties onto any alleged FLSA violation"); *see also*, *Travis*, *supra*.

B. Even Assuming *Arguendo* That Otey Could Recover Wage Penalties Under Oregon Law (in Addition to Liquidated Damages Under the FLSA), the Offer Mooted All Other Individual Claims In This Action As Well As the Collective Claims Under the FLSA.

Even assuming arguendo that Otey could recover penalties under ORS § 652.150 (in addition to liquidated damages under the FLSA), all of his other individual claims were mooted as well as the collective claims under the FLSA. Defendants' most recent offer to Otey states, in pertinent part, "[p]ursuant to Rule 68 of the Federal Rules of Civil Procedure, CrowdFlower, Inc., Christopher Van Pelt and Lukas Biewald (collectively "Defendants"), offer to allow judgment to be taken against them without any finding of liability or wrongdoing for the claims made by Christopher Otey." (*See* Dkt. 150, Ex. D). While Plaintiffs assert that, by its terms, the offer applied generally to "the claims made by Christopher Otey" and "was not limited to certain claims" [Dkt. 163 p. 8], this argument ignores the fact that it was understood by all parties that the offer did not encompass the Oregon penalty claim.

As background, Defendants' offers of judgment were served on Plaintiffs Otey and Greth on July 16, 2013. Defendants' motion to dismiss [Dkt. 150] was filed on July 19, 2013, only a few days later and more than ten (10) days before Plaintiffs' deadline passed for responding to the offers. Defendants' motion detailed the damages calculations, which make abundantly clear that they covered only alleged minimum wage damages as well as liquidated damages. (*See* Dkt. 150 pp. 4-5.) There plainly was no calculation of penalty wages under Oregon law included in Defendants' motion. Notably, Otey also waited until the last possible day to respond to the offer of judgment, even though, according to an article prepared by his counsel and published on July 21, 2013 on Indybay, indicated that the offer had already been rejected.[2] Thus, Otey had an approximately 10-

[2] A copy of that article, entitled "CrowdFlower Offers to Buy Off Plaintiffs to Avoid Nationwide Lawsuit for Minimum Wages" and authored by Ellen Doyle is attached as Exhibit B. The article expressly states that "CrowdFlower offered the two plaintiffs money to settle, **which they did not accept.**" Notwithstanding this public representation that the offers had been rejected as of at least July 21, 2013, the date of publication, Plaintiffs' counsel requested an extension of time to respond to Defendants' Motion, citing a need to wait until the July 30, 2013 deadline to respond to the offers. Plaintiffs' counsel inexplicably asked, despite the representation in the article, that Defendants "not

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San Francisco, CA
94108.2693
415.433.1940

day period with the benefit of both the offer and Defendant's motion, which made clear that the offer did not include penalty wages.

Even were it not obvious from Defendants' Motion that wage penalties under Oregon law were not included in the offer, Otey's counsel never sought clarification regarding the scope of the offer and in counsel's eleventh hour, 3-page letter rejecting the offer, never once mentioned that it was being rejected based on the omission of the Oregon wage penalty claim under Oregon law. Instead, counsel simply stated, in the most general terms, that "Defendants' Offers of Judgment are insufficient. The relief offered does not satisfy both of the named Plaintiffs' anticipated recoveries if they prevailed at trial." (Dkt. 163-9 p. 4.) The vagueness in describing the basis for rejecting the offer hardly seems coincidental given that reference to the omission of the penalty wages presumably would have either confirmed counsel's understanding of the scope of the offer and/or provided Defendants with an opportunity to clarify the terms of the offer to the extent necessary.[3] Nonetheless, Plaintiffs' Response, which Plaintiffs, through a motion for extension of time ensured would be filed well after the time for responding to the offers of judgment had passed, makes clear that Plaintiffs' counsel understood that Defendants' offer to Otey did not include wage penalties under Oregon law. Indeed, Plaintiffs candidly acknowledge, "Defendants intentionally chose not to offer any judgment for Mr. Otey's 'penalty wage' claim under Oregon law" while simultaneously arguing that "[t]he offer was not limited to certain claims." (*See* Dkt. p. 8, n. 2.)

While Defendants concede that the offer to Otey itself did not expressly state that it did not cover the wage penalty claim under Oregon law, the Motion made that clear to Plaintiffs' counsel, who has conceded as much in their Response. (*See id*.) Thus, even though counsel for Plaintiff knew that wage penalties were intentionally excluded from the offer, their legal position is that the offer applied to all claims and was therefore insufficient because the amount was insufficient to

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consider the posting referenced [] to constitute Plaintiffs' responses to the pending Rule 68 offers." A copy of the emails exchanged by counsel regarding this matter are attached as Exhibit C.

[3] Moreover, it also is notable that very shortly after rejecting the offer (without providing an explanation as to its purported inadequacy based on the omission of the penalty wage claim), Plaintiffs filed the Notice of Consent by Nancy Miller to join this action. (*See* Dkt. 156.)

cover the wage penalty claim.[4] The Ninth Circuit repeatedly has recognized that the normal rules of contract construction apply to offers of judgment under Rule 68, and thus extrinsic evidence may be considered to resolve ambiguities (which are construed against the offeror). *See Stonebrae L.P. v. Toll Bros., Inc.*, 2013 U.S. App. LEXIS 6369, **2-4 (9th Cir. March 29, 2013); *Erdman v. Cochise County*, Ariz., 926 F. 2d 877, 880 (9th Cir. 1991). Here, the Court then should consider the circumstances surrounding Defendants' extension of the offer of judgment to Otey and his rejection of it as well as his counsel's acknowledgment that the offer did not include "any judgment for Mr. Otey's 'penalty wage' claim under Oregon law." (*See* Dkt. 163 p. 8 n. 2.); *see also Stonebrae*, 2013 U.S. App. LEXIS 6369 at *3 (concluding that the district court "appropriately resolved any ambiguity by considering extrinsic evidence", including attorney's statements in court regarding the Rule 68 offer); *Asus Computer Int'l v. Compsolutions VA, Inc.*, 2008 U.S. Dist. LEXIS 120119, *6 (N.D. Cal. June 5, 2008) (observing that "where necessary, [a court] will consider extrinsic evidence of the parties' intentions in order to clarify the offer's material terms.") Indeed, this Court should not countenance counsel's gamesmanship designed to thwart Defendants' good faith efforts to use a favored procedural mechanism, sanctioned by the Federal Rules of Civil Procedure, to resolve this action without further litigation.[5] *See, e.g., Marquez v. Harper Sch. Dist. No. 66*, 2011 U.S. Dist. LEXIS 130810, *5 (D. Or. Nov. 10, 2011) ("Rule 68 offers and acceptances are favored by the courts for purposes of encouraging termination of litigations."), *citing*, *United States v. Trident Seafoods Corp.*, 92 F. 3d 855, 860 (9th Cir. 1996).

Plaintiffs' reliance on *Chie v. Reed Elsevier, Inc.* is misplaced as that case is easily distinguishable. (*See* Dkt. 163 pp. 8-9.) While in *Chie*, the defendants similarly argued that the

[4] Even if there had been some doubt as to the terms of the offer, which is belied by Plaintiffs' Response, the appropriate course for Otey would have been to seek clarification regarding the terms of the offer. "A plaintiff may seek clarification of an ambiguous offer of judgment. Initially, the plaintiff should seek clarification from the offering defendant. If clarification is not forthcoming, the plaintiff should consider filing a motion to strike." *See* 4-49 FEDERAL LITIGATION GUIDE § 49.30; *see also Arkla Energy Resources v. Roye Realty & Devel., Inc*, 9 F. 3d 855 (10th Cir. 1993) (observing that the plaintiff had responded to the defendant's offer of judgment with a motion to clarify offer of judgment, which the district court granted).

[5] In addition to the foregoing, as detailed more fully in Defendants' Motion, Defendants have repeatedly sought to have Plaintiffs clarify the amount of damages to which they believe they are entitled. Plaintiffs have repeatedly declined to provide such information.

plaintiffs' federal and state wage and hour claims should be dismissed as moot based on offers of judgment, importantly, the offers at issue in *Chie* did not include an amount that sufficiently covered the maximum damages that the plaintiffs could have recovered for their wage-and-hour claims. 2011 U.S. Dist. LEXIS 99153, **6-7 (N.D. Cal. Sept. 2, 2011). More specifically, the offers did not include allocations for potential liquidated damages or straight time pay, which the plaintiffs sought. *See id.* at *7. Additionally, the offers did not include prejudgment interest and attorneys' fees. *See id.* Here, in stark contrast, the Defendants' offers to Plaintiffs clearly included wage-based damages, liquidated damages as well as "reasonable attorneys' fees, costs, expenses and interest as the Court may determine are appropriate." The only omission from the offer was penalty wages under Oregon law, which would have been duplicative of liquidated damages under the FLSA.

Plaintiffs' additional argument that Defendants' offers were based on "estimates" is also unavailing. (*See* Dkt. 163 p. 9.) Initially, to the extent that Plaintiffs are suggesting that the *Chie* Court ruled as it did because the offers of judgment were based on "estimates," such a suggestion is inaccurate. In finding that the offers were insufficient for the reasons summarized above, the court "put[] aside the fact that the amounts were calculated based on estimates only." *See Chie*, 2011 U.S. Dist. LEXIS 99153 at *7. Further, Plaintiffs' argument ignores the fact that, here, Defendants calculated the offers based on data from AMT that is unquestionably and significantly over-inclusive relative to the time each Plaintiff actually spent performing tasks for CrowdFlower, did not make any deductions from the total amounts based on sums already paid to each Plaintiff and then offered an amount in excess of the calculated totals. (*See* Dkt. 150 pp. 4-6.) All that Defendants must show is that they have offered Plaintiffs as much as or more than they would be legally entitled to recover should they prevail. *See Chie*, 2011 U.S. Dist. LEXIS 99153 at *8. Defendants need not, as Plaintiffs seem to suggest, estimate with mathematical certainty the exact amount of Plaintiffs' potential back wages based on the precise amount of time each Plaintiff worked. As Plaintiffs should realize by now, based on the limited data available and the manner in which time was tracked, doing so simply is not possible *and will not become possible at some later time in this litigation*. What can definitely be determined (using the AMT data), however, is the maximum amount of time Plaintiffs could have possibly worked based on all time during which tasks were

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open. Due to task over lap and the fact that Plaintiffs presumably were not working during every second that a task was open, the AMT data places a reliable ceiling on the total amount of time each Plaintiff could have worked. It is also worth pointing out that Plaintiff Otey's written demand to Defendants [Dkt. 121 p. 20] states that "Mr. Otey's minimum wages due are estimated at $280.00." While that demand presumably did not include liquidated damages, the disparity between his $280 demand and Defendants' offer in the amount $2,148 underscores the unreasonableness of Plaintiffs' position. By Plaintiffs' logic, if one's potential damages were determined to be more than $10.00 but less than $100.00, an offer of $1,000.00 would be insufficient to cover the potential damages because it is based on an "estimate." Such logic might be persuasive if $75 was offered in that scenario, or even $99.00, but not in a situation such as this where the offer exceeds the maximum amount of recovery. In short, the exact amount of Plaintiffs' damages does not need be determined in order to conclude whether the amount offered covers all that they may be legally entitled to recover.[6]

C. Plaintiffs' Arguments Regarding Defendants' Document Production Should Have No Bearing On Resolution of Defendants' Motion.

Plaintiffs' arguments regarding Defendants' purported failure to produce documents that Plaintiffs require to calculate damages are a red herring that have no bearing on the issues before the Court. (*See* Dkt. 163 pp. 9-12.) Tellingly, in their response, aside from the wage penalty issue already addressed above, Plaintiffs have provided absolutely no substantive challenge to the adequacy of the offers made to Otey and Greth. Instead, their strategy appears to be to continue to insist that there are documents/data somewhere in CrowdFlower's possession that will somehow place them in a position to determine their damages at some later time and until that occurs, no

[6] While Plaintiffs make much of Defendants' previous offers of judgment to Otey, Plaintiffs fail to acknowledge that the first three offers were for amounts within $5.00 of Plaintiff's pre-lawsuit demand. (*See* Dkt. 121 p. 20). Those offers did not cover liquidated damages, which Defendants did not (and do not) believe Plaintiffs would be able to recover should they otherwise prevail. The substantial increase in the more recent offer was intended to not only cover potential liquidated damages but also to take the offer well outside of any realm that Otey might be able to, for any reason, challenge as potentially being less than his "best day." In other words, Defendants believe that Otey's "best day" would result in damages in an amount that is far less than Defendants most recently offered.

matter how much Defendants offer, they will never know with certainty whether the amount is sufficient to cover their claims. Moreover, notwithstanding Plaintiffs arguments to the contrary, Defendants have provided Plaintiffs with the data that they possess bearing on Plaintiffs' performance of CrowdFlower tasks during the relevant period (data which reflect that Plaintiffs worked significantly less than the amount of time Defendants computed using the AMT data).[7]

Finally, Plaintiffs fail to provide any explanation as to why the AMT data (a detailed description of which is included in Dkt. 150 pp. 4-6) is somehow unreliable or should not be used to determine the maximum amount of time Plaintiffs could have spent performing tasks for CrowdFlower. Indeed, it is undisputed that all of the work performed by both Otey and Greth was performed on the AMT platform, not through CrowdFlower's website. (Deposition of Plaintiff Christopher Otey[8] pp. 19; 114-15; 212; Opt-In Plaintiff Mary Greth's Responses to Defendant CrowdFlower, Inc.'s Interrogatories (Set One)[9] ¶ 14.) Thus, it is nonsensical for Plaintiffs to insist that the AMT data should not be used.

D. *Genesis Healthcare Corp. v. Symczyk* Squarely Applies to this Matter.

Plaintiffs' various arguments attempting to distinguish *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 129 (2013), and convince that Court that it does not apply to this matter are unavailing. Initially, Plaintiffs assert that *Genesis* does not apply here because Defendants' offer to Otey did not cover his wage penalty claim under Oregon law. (*See* Dkt. 163 p. 12.) As more fully addressed, *supra*, the offer properly excluded that claim and in any event, Plaintiffs understood it to have been excluded from the offer.

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[7] Without directly acknowledging that CrowdFlower does not have all of the data that Plaintiffs seek, Plaintiffs further assert that the FLSA and Oregon wage-and-hour laws impose record-keeping requirements and generally require employers to preserve records of wages and hours worked. Yet, whether Defendants were employers covered by those laws is a disputed issue in this case. If Defendants were not employers, the record-keeping requirements of federal and state wage-and-hour law simply do not apply. In any event, any obligation Defendants may or may not have had with regard to record-keeping does not change the reality of what data actually exists or somehow impact or undermine the AMT data relied upon by Defendants in making their damages calculations.

[8] Copies of the excerpts from the transcript of Plaintiff Christopher Otey's Deposition, cited herein, are attached as composite Exhibit D.

[9] A copy of Opt-In Plaintiff Mary Greth's Responses to Defendant CrowdFlower, Inc.'s Interrogatories (Set One) is attached as Exhibit E.

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650 California Street
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Plaintiffs also argue that *Genesis* does not apply here because there are two opt-in Plaintiffs. (*See* Dkt. 163 p. 12.) Yet, one of those opt-in Plaintiffs was Greth, who also received an offer of judgment in full satisfaction of her claims. The other opt-in, Nancy Miller, did not opt-in to this action until August 1, 2013, *after* the offers of judgment were extended (and rejected). (*See* Dkt. 156.) Thus, for the reasons explained in Defendants' Motion, Plaintiffs' claims were mooted before Miller opted in to this action. *See Bilabo v. Bros. Produce*, 2013 U.S. Dist. LEXIS 65812, *6 (S.D. Fla. May 7, 2013) (granting the defendant's motion to dismiss where the defendant made an offer of judgment to Plaintiff two weeks before four other plaintiffs submitted notices to "opt-in" to the FLSA collective action).

Plaintiffs further assert that *Genesis* is inapplicable because in *Genesis*, "Ms. Symczyk had not filed a motion for conditional certification at the time of the offer of judgment." (Dkt. 163 p. 13.) As the Supreme Court pointed out, however, "respondent's suit became moot when her individual claim became moot [] ***because she lacked any personal interest in representing others in this action***." *See Genesis*, 133 S. Ct. at 1530. Thus, following *Genesis*, pendency of Plaintiffs' conditional certification motion or even conditional certification does not save Plaintiffs' federal and state wage-and-hour claims from mootness. *See Genesis*, 133 S. Ct. at 1530 ("Even if respondent were to secure a conditional certification ruling on remand, nothing in that ruling would preserve her suit from mootness."). Since a plaintiff bringing a putative collective action "lack[s] any personal interest in representing others," the sole threshold question that needs to be resolved to determine the outcome of the collective claims is whether the plaintiff's claims became moot by the offer of judgment. While the Supreme Court in *Genesis* did not reach this issue and noted a split among the circuits, the Ninth Circuit has reached the issue and determined that a court lacks subject matter jurisdiction where an offer of judgment in full satisfaction of a plaintiff's claims is made. *See Marschall v. Recovery Solutions Specialists, Inc.*, 399 Fed. Appx. 186, 187 (9th Cir. 2010) (concluding that the "district court properly dismissed [the plaintiff's] individual claims against [the defendant] for lack of subject matter jurisdiction because [the defendant's] offer of judgment was far more than [the plaintiff] was legally entitled to recover."); *see also Makreas v. The Moore Law Group, A.P.C.*, 2012 U.S. Dist. LEXIS 17211, *4 (N.D. Cal. Feb. 2, 2012); *Echlin v. Columbia*

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650 California Street
20th Floor
San Francisco, CA
94108.2693
415.433.1940

Collectors, Inc., 2013 U.S. Dist. LEXIS 31811, *7 (W.D. Wash. March 7, 2013); *Scott v. Federal Bond and Collection Serv., Inc*., 2011 U.S. Dist. LEXIS 5278, **8-9 (N.D. Cal. Jan. 19, 2011).

Plaintiffs also assert that "Defendants unreasonably rely on the Ninth Circuit's memorandum decision in *Marschall*" "instead of the Ninth Circuit's later, fully-reasoned decision in *Pitts*" as if the two decisions were directly at odds on the same issue. (Dkt. 163 p. 15.) They clearly are not. Defendants rely on *Marschall* as controlling the threshold issue not reached by the Supreme Court in *Genesis* of "whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot." *See Genesis*, 133 S. Ct. at 1528-29. *Marschall* clearly compels the answer as the Ninth Circuit concluded that the "district court properly dismissed [the plaintiff's] ***individual*** claims against [the defendant] for lack of subject matter jurisdiction because [the defendant's] offer of judgment was far more than [the plaintiff] was legally entitled to recover."[10] *Marschall,* 399 Fed. Appx. at 187. In contrast, in *Pitts v. Terrible Herbst, Inc*., the Ninth Circuit held that "an unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification—does not moot a ***class*** action. If the named plaintiff can still file a timely motion for class certification, the named plaintiff may continue to represent the class until the district court decides the certification issue." 653 F. 3d at 1091-92 (emphasis supplied). *Pitts* does not stand for the broader proposition that an unaccepted offer of judgment (outside of the class action context) that fully satisfies a plaintiff's claims does not render the claims moot. *Pitts* was limited to class actions and in *Genesis*, the Supreme Court directly rejected the plaintiff's reliance on Rule 23 class action cases in the collective action context, reasoning that "Rule 23 actions are fundamentally different from collective actions under the FLSA." *See Genesis*, 133 S. Ct. at 1529; *see also*, *Chen v. AllState Ins. Co*., 2013 U.S. Dist. LEXIS 81409, *17 (N.D. Cal. June 10, 2013) (observing that "under the FLSA, a 'conditional certification' does not confer independent legal status (as a Rule 23 certification does).") (citing *Genesis*.) Thus, *Pitts* is not controlling with regard to Plaintiffs' putative collective claims under the FLSA.

[10] As reflected in the district court's civil minutes from that case, attached hereto as Exhibit F, the offer of judgment at issue was not accepted. *See Marschall v. Recovery Solutions Specialists, Inc.*, SACV 07-726 JVS (ANx), Dkt. 42, p. 3 (C.D. Cal. Dec. 17, 2007)

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Finally, Plaintiffs' argument that Defendants' Motion should be denied because jurisdictional issues are intertwined with the merits is completely misguided and rests on the faulty premise that the adequacy of Defendants' offers of judgment cannot be determined until a later stage of litigation. As explained above, determining with mathematical precision an exact amount that a plaintiff could recover is not required. Courts routinely have dismissed as moot actions where offers of judgment were made which clearly met or exceeded all that a plaintiff could conceivably recover. Given that Defendants unquestionably have offered Plaintiffs more than they could possibly recover in the event that they prevail on their federal and state wage-and-hour claims, Plaintiffs' argument is simply a straw man. Aside from the omission of wage penalties from Otey's offer, Plaintiffs have made no substantive challenge to the adequacy of Defendants' offers or even professed a good faith belief that data that they expect to obtain through additional discovery will show that the amounts offered by Defendants may be inadequate. Nor could they as Defendants relied on the AMT data, which was significantly over-inclusive of time worked and exceeded the amount of time worked by Otey and Greth as reflected in CrowdFlower's own records.

E. Dismissal of Plaintiffs' Federal Claims Would Impact The Amount in Controversy for Purposes of Determining Jurisdiction.

Much of Plaintiffs argument regarding diversity jurisdiction is irrelevant to the basis for Defendants' jurisdictional challenge, which was directed at Plaintiffs failure to satisfactorily demonstrate that the aggregate $5,000,000 amount in controversy requirement is satisfied. Further, Defendants' answer to the Amended Complaint respecting allegations relating to jurisdiction obviously occurred prior to the mootness of Plaintiffs' claims, including the collective claims under the FLSA, which clearly eliminates that vast majority of the putative class. Additionally, while Plaintiffs claim that "[u]nder the CAFA, with minor exceptions, 'post-filing developments do no defeat jurisdiction if jurisdiction was properly invoked at the time of filing,'" one of the "minor exceptions" identified by the Ninth Circuit is mootness. *See United Steel, Paper & Forestry, Rubber, Manuf., Enerey, Allied Indus. & Serv. Workers Int'l Union v. Shell Oil Co*., 602 F. 3d 1087, 1091-92 n. 3 (9th Cir. 2010) ("We recognize . . . exceptions to the general rule of 'once jurisdiction, always jurisdiction'—such as when a case becomes moot in the course of litigation. . . ."); *see also*

Robinson v. Hornell Brewing Co., 2012 U.S. Dist. LEXIS 176699,**27-32 (D. N.J. Dec. 12, 2012) (concluding, after determining that it lacked subject matter jurisdiction over class action claims, that there remained no independent basis for jurisdiction over the plaintiff's individual damages claim which did not meet the amount in controversy requirement). Thus, Defendants' jurisdictional challenge premised on the elimination of Plaintiffs' individual and collective claims under the FLSA based on mootness is entirely proper and, for the reasons more fully set forth in their motion, Plaintiffs have not met the amount in controversy requirement. Because Plaintiffs are unable to provide sufficient evidence to demonstrate that jurisdiction is proper, any remaining class claims under Oregon law should be dismissed under Rule 12(b)(1) due to Plaintiff Otey's failure to satisfy the requirements of 28 U.S.C. § 1332(d)(2). *See Hildreth v. Unilever United States, Inc*., 2010 U.S. Dist. LEXIS 136584, **11-12 (C.D. Cal. Dec. 15, 2010) ("As respects the alleged amount in controversy, plaintiffs allege only that 'the aggregated claims . . . exceed the sum or value of $5,000,000 and that plaintiffs purchased defendants' products 'on several occasions.' Plaintiffs provide no specific indication of the amount of economic injury sustained individually, or by the class. This allegation does not demonstrate that the aggregate $5,000,000 amount in controversy requirement is satisfied. . . . The court may not exercise jurisdiction under CAFA on the basis of this type of speculation.").[11]

F. The Court Should Decline to Exercise Supplemental Jurisdiction Over Any Claims that May Remain Under State Law.

Plaintiffs' principal argument that the Court should retain supplemental jurisdiction is that Defendants, as the moving parties, "have failed to describe how the interests of judicial economy, convenience and fairness to the parties are best served by dismissal of the Oregon minimum wage claims." (*See* Dkt. p. 22.) Initially, as the Supreme Court has recognized, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy convenience, fairness, and comity—will point

[11] Plaintiffs' remaining arguments regarding satisfaction of the jurisdictional threshold appear to be based purely on surmise and speculation and would seem to support only that Plaintiffs have no understanding of how many potential Oregon class members there might be or how much their purported damages are.

LITTLER MENDELSON, P.C.
650 California Street
20th Floor
San Francisco, CA
94108.2693
415.433.1940

toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7 (1988); *see also Schultz v. Sundberg*, 759 F. 2d 714, 718 (9th Cir. 1985) ("Generally, dismissal of federal claims before trial dictates that the pendent state claims should also be dismissed."). Further, here, there are a number of significant considerations that strongly support declining to exercise supplemental jurisdiction upon dismissal of Plaintiffs' federal claims: (1) most of the purported multitude of Oregon class members (which Plaintiffs suggest would be at least 2,203 individuals) presumably continue to reside in Oregon; (2) all of the remaining legal issues in this matter are governed by Oregon law; and (3) with regard to the class claims under Oregon law, this case is in its infancy as a case management conference has not even been held nor has a deadline for filing a motion to certify the Oregon claims as a class action been set.[12] *Asis Internet Servs. v. Member Source Media, LLC*, 2010 U.S. Dist. LEXIS 47865, *18 (N.D. Cal. April 20, 2010) (declining to exercise supplemental jurisdiction even though the case had been pending for two years where no trial date was near, only limited discovery had occurred and there had been no substantive or dispositive rulings by the Court). Also, it is highly significant that this case will present the novel issue, not previously decided by Oregon courts, of whether individuals performing crowdsourcing tasks are employees under Oregon law. *See Rounseville v. Zahi,* 13 F. 3d 625, 631 (2d Cir. 1994) (concluding that, where the state claim required an application of state law that was potentially novel, the state claim was appropriately resolved in state court, and retention of the state claim after the dismissal of the federal claim "would be an inappropriate exercise of pendent jurisdiction and a waste of judicial resources"); *Morse v. Univ. of Vermont*, 973 F. 2d 122, 127-28 (2d Cir. 1992) (concluding that where state claims involved novel questions of law, it was an abuse of discretion to exercise jurisdiction over such claims after dismissing the federal claims). Moreover, the appropriateness of dismissal here is underscored by the fact that other courts have declined to exercise supplemental jurisdiction under similar circumstances. *See*, *e.g.*, *Ward v. Bank*

[12] Plaintiffs' reliance on the forum selection clause in its service agreements is misplaced. (*See* Dkt. 163 p. 23.) Plaintiffs fail to mention that such clauses are included in CrowdFlower's service contracts with channel providers, not individual contributors such as Plaintiffs, with whom CrowdFlower did not contract. Because Plaintiffs were not signatories to any such agreements, clearly they cannot insist that the Defendants are bound by these forum selection clauses.

of New York, 455 F. Supp. 2d 262, 270 (S.D. N.Y. 2006) (declining to exercise supplemental jurisdiction over plaintiff's state law claims after granting defendant's motion to dismiss plaintiff's FLSA claims based on Rule 68 offer of judgment); *Bilbao*, 2013 U.S. Dist. LEXIS 65812 at **4-5 (same); *Briggs v. Arthur T. Mott Real Estate*, 2006 U.S. Dist. LEXIS 892891 at **11-12 (E.D.N.Y. 2006) (same).

III. CONCLUSION

For all of the foregoing reasons and for the reasons explained in Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the Court lacks subject matter jurisdiction over the Plaintiffs' federal and state wage-and-hour claims as well as their collective claims under the FLSA. Defendants therefore respectfully request that the Court dismiss those claims and decline to exercise supplemental jurisdiction over any claims under state law that may remain.

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Respectfully submitted,

LITTLER MENDELSON, P.C.

By: */s/ R. Bradley Adams*
R. BRADLEY ADAMS (*pro hac vice*)
ARTHUR M. EIDELHOCH
GALEN M. LICHTENSTEIN
JACQUELINE E. KALK (*pro hac vice*)
KELLY D. REESE (*pro hac vice*)
Attorneys for Defendants
CROWDFLOWER, INC., LUKAS BIEWALD AND CHRIS VAN PELT

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